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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

vs.

NASSAU COUNTY and NASSAU COUNTY POLICE DEPARTMENT,

Respondents.

INDEX NO: _________

MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION

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PRELIMINARY STATEMENT

Pursuant to the Freedom of Information Law ("FOIL"), the New York Civil Liberties Union ("NYCLU" or "Petitioner") seeks relief to redress improper denials by Nassau County and the Nassau County Police Department ("NCPD" and, collectively, "Respondents") of Petitioner's September 2020 request for documents related to police misconduct. NCPD has interposed blanket denials which, if permitted, would categorically shield from disclosure (i) all police discipline records created prior to June 2020, (ii) all records created post-June 2020 regarding complaints that did not result in discipline, and (iii) all use of force and police stop records. Such sweeping exceptions are contrary to the plain language of the FOIL regime and prevailing caselaw. They would also defeat the core purpose of the law as reflected in the legislative history—to increase public transparency.

FOIL is grounded in important public policy meant to ensure that government agencies and their employees are held accountable to the public. The recent and comprehensive repeal of Section 50-a of the New York Civil Rights Law ("Section 50-a") specifically mandates the disclosure of redacted versions of all police disciplinary files—the very records at issue here. In response to nationwide protests reckoning with biased policing on the heels of the murder of George Floyd, the New York State Legislature (the "Legislature") determined that access to records bearing on police accountability is in the public interest. In addition to making previously secret police disciplinary records publicly available, the Legislature amended FOIL to add privacy protections that delineate the limited material that can be redacted from such records. NCPD's sweeping denials impermissibly attempt to overwrite the FOIL regime and the repeal of Section 50-a and substitute the Legislature's considered judgment with its own views.

Having exhausted its administrative remedies, Petitioner now seeks judicial relief under Article 78 to order Respondents to produce all responsive records, including law enforcement

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disciplinary records, reports documenting officers' use of force, records documenting stops and field interviews, civilian complaints leveled against officers, and investigatory reports related to officer discipline, regardless of disposition. Petitioner also seeks an award of attorneys' fees and costs due to Respondents' failure to adhere to FOIL's requirements.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. The Legislature's Repeal of Section 50-a

In New York State, the repeal of Section 50-a was a watershed moment, intended to effect "not just a change in law but, rather, a change in the culture." *Schenectady Police Benevolent Ass'n v. City of Schenectady*, 2020 N.Y. Misc. LEXIS 10947, at *19 (N.Y. Sup. Ct. Dec. 29, 2020) ("*Schenectady PBA*"). Prior to the repeal of Section 50-a, police disciplinary records were comprehensively insulated from public disclosure. *See* Section 50-a (repealed June 12, 2020). When initially enacted in 1976, Section 50-a imposed modest limitations to the public disclosure of police disciplinary records. Over time, the cloak it placed over official records expanded with police departments and unions using the provision as a basis to withhold all records and shield the conduct of law enforcement personnel from public scrutiny and civilian oversight. According to a report from the Department of State Committee on Open Government ("COOG"), by 2014, courts had expanded Section 50-a to allow police departments to withhold "virtually any record that contains any information that could conceivably be used to evaluate the performance of a police officer."[1] On June 12, 2020, when Senate Bill S8496/Assembly Bill A10611 (the "Repeal Bill") was signed into law, the state dismantled the prior regime of categorical secrecy. S. 8496, 243d Sess. (N.Y. 2020); Assemb. 10611, 2019-2020 Reg. Sess. (N.Y. 2020).

[1] Exhibit 1 to the Verified Petition.

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II. FOIL Amendments Related to Law Enforcement Disciplinary Records

Section 50-a's repeal was accompanied by an amendment to Public Officers Law ("POL") Section 86(6), adding "law enforcement disciplinary records" to the government records subject to disclosure. *See* N.Y. S. 8496; N.Y. Pub. Off. Law § 86(6). The Legislature defined "law enforcement disciplinary records" to mean "***any*** record created in furtherance of a law enforcement disciplinary proceeding," which includes, among other things, the "complaints, allegations, and charges" against an officer. § 86(6) (emphasis added). The Legislature further defined "law enforcement disciplinary proceeding" to mean "the commencement of ***any investigation*** and any subsequent hearing or disciplinary action conducted by a law enforcement agency." § 86(7) (emphasis added). This definition does not distinguish between records created before and after June 2020. *Id.*

The Sponsoring Memorandum to the Repeal Bill stated that the public's inability to access "complaints or findings of law enforcement misconduct" was the primary purpose behind Section 50-a's repeal and the corresponding amendments to FOIL: "Police-involved killings by law enforcement officials who have had histories of misconduct complaints . . . have increased the need to make these records more accessible."[2]

The Legislature, through the Repeal Bill, simultaneously amended POL Section 87 to add two new provisions governing the privacy protections afforded to "a law enforcement agency responding to a request for law enforcement disciplinary records." *See* N.Y. S. 8496; N.Y. Pub. Off. Law § 87. The first of these provisions states that "[a] law enforcement agency responding to a request for law enforcement disciplinary records as defined in [POL Section 86] shall redact

[2] Senate Bill, S8496, *Justification*, NYSenate.gov, https://www.nysenate.gov/legislation/bills/2019/s8496 (last visited October 1, 2021).

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any portion of such record containing the information specified in [POL Section 89(2-b)] prior to disclosing such record under this article." § 87(4-a). To address valid, genuine privacy concerns, it requires the producing agency to redact: (i) medical history information; (ii) home addresses, personal telephone numbers, personal e-mail addresses of the employee and their family members; (iii) any social security number; and (iv) the use of an employee assistance program, mental health service, or substance abuse assistance service. *See* § 89(2-b).

The second new privacy provision permits—but does not require—redaction of any portion of a law enforcement disciplinary record that pertains only to "technical infractions." *See* §§ 87(4-b), 89(2-c). "Technical infractions" is a limited term of art and cannot include incidents stemming from an interaction with the public, that are of public concern, or that are otherwise related to an officer's investigative or enforcement responsibilities. *See* § 86(9).

Neither of these amended FOIL provisions—nor any other section of the POL—distinguishes between records created before and after June 2020.

III. NCPD's Repeated Delays and Refusal to Produce Records

On September 15, 2020, Petitioner sent a FOIL request to NCPD's FOIL Officer seeking, *inter alia*, records from January 1, 2000 to the present pertaining to officer discipline, use of force, stops and field interviews, civilian complaints, and certain investigative reports (the "Request").[3] Later that day, NCPD confirmed receipt of the Request and stated that Petitioner "should receive a response within forty-five (45) business days."[4] NCPD failed to respond within that time period. NCPD informed Petitioner that the delay was due to an emergency medical leave and Petitioner could expect a response by December 4, 2020.[5] NCPD failed to meet this extended deadline as

[3] Exhibit 2 to the Verified Petition.

[4] Exhibit 3 to the Verified Petition.

[5] Exhibit 4 to the Verified Petition.

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well. On December 11, 2020, NCPD finally responded to the Request (the "December Response").[6]

In its December Response, NCPD denied certain portions of the Request.[7] After productive meet-and-confers held on December 29, 2020 and January 7, 2021, however, NCPD rescinded its denial.[8] Thereafter, on February 10, 2021, Petitioner sent a letter clarifying several items in the Request (the "February 10 Letter") to NCPD's counsel, Christopher Todd, as part of Petitioner's ongoing effort to work collaboratively with NCPD in locating and identifying records.[9]

After several months of delay tactics by the NCPD, as described in more detail in the Verified Petition, Petitioner understood NCPD's silence as a constructive denial.[10] On May 20, 2021, Petitioner sent an administrative appeal letter to NCPD's FOIL Appeals Officer, explaining the grounds for its appeal of NCPD's constructive denial of the Request.[11]

On June 3, 2021, NCPD replied to Petitioner's administrative appeal (the "June Response," and together with the December Response, the "Responses").[12] NCPD's June Response supplemented its December Response to Petitioner's Request, granting certain of Petitioner's requests but denying others.[13] As grounds for its denials, described in further detail below, NCPD cited various FOIL provisions, including POL Sections 87(2)(b), (e), (g), and 89(3)(a). NCPD

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6 Exhibit 5 to the Verified Petition.

7 *Id.*

8 Exhibit 6 to the Verified Petition.

9 Exhibit 7 to the Verified Petition.

10 Exhibit 12 to the Verified Petition.

11 Exhibit 13 to the Verified Petition.

12 *See* Exhibit 14 to the Verified Petition.

13 *Id.*

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also constructively denied two of Petitioner's requests for statistical information related to the filing and investigation of civilian complaints against officers. Notably, NCPD articulated certain of its arguments—that the repeal of Section 50-a does not apply to records created prior to June 12, 2020,[14] and that officers' collective bargaining agreements ("CBAs") override the Legislature's decision to repeal Section 50-a—for the ***very first time*** in its June Response.[15]

Having exhausted its administrative remedies, Petitioner files this Petition pursuant to Article 78 of New York's Civil Practice Law & Rules seeking immediate production of responsive records, as well as attorneys' fees and costs.

ARGUMENT

I. NCPD Has Not Articulated A Particularized Justification for Withholding the Records in Dispute

As a threshold matter, NCPD's bare invocation of FOIL exemptions cannot justify its categorical refusal to produce the records in dispute. NCPD "carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access." *Capital Newspapers Div. of Hearst Corp. v. Burns*, 496 N.E.2d 665, 667 (N.Y. 1986).[16] "Conclusory assertions that certain records fall within a statutory exemption are not sufficient; ***evidentiary support is needed***." *Empire Ctr. for Pub. Policy v. N.Y.C. Police Pension Fund*, 107 N.Y.S.3d 646, 649 (N.Y. Sup. Ct. 2019). Nowhere in its Responses does NCPD adduce any evidence to justify its withholding any of the requested documents. To the contrary, NCPD does nothing more than cite to subsections of FOIL and recite statutory language. Such boilerplate objections do not satisfy the standard established by the Court

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[14] *Id*. at 1, 6-7.

[15] *Id*. at 2.

[16] Unless otherwise noted, case citations herein omit internal quotation marks, citations, emphases, and alterations.

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of Appeals Having failed to articulate any particularized justification for denying access, NCPD should be directed to produce the requested records.

II. NCPD Must Produce Disciplinary Records Created On or Before June 12, 2020

A. NCPD's "Retroactive" Argument is Meritless

NCPD argues that the repeal of Section 50-a does not apply "retroactively" to disciplinary records created before enactment of the repeal on June 12, 2020.[17] NCPD's position is baseless for two independent reasons. First, the FOIL governs whether or not a government agency must produce documents in response to a public request for disclosure. It sets the rules and parameters for responding and objecting to such requests. FOIL does not itself address the creation or maintenance of public records. The relevant inquiry is therefore what law existed at the time the FOIL request was received. Here, the FOIL request was received after the repeal of Section 50-a and is thus governed by the current FOIL law. The date that records were created is irrelevant to the FOIL analysis. The FOIL request seeks records currently in the possession of the NCPD. It is axiomatic that, if an agency has responsive records in its possession at the time a FOIL request is made, those records must be produced unless a specific exemption applies. *Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 274-75 (1996) (all government records are "presumptively open for public inspection [] unless they fall within one of the enumerated exemptions of [FOIL]."). Without Section 50-a in effect, there is no longer any exemption for NCPD to invoke to justify the denial of any disciplinary records in its possession. There is also nothing in the new law that would suggest that it applies only to after-created documents. NCPD cites no authority for the proposition

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[17] *Id.* at 3-7 (refusing to produce "all disciplinary records," "all civilian complaints" and "all investigative reports regarding each law enforcement officer cleared of wrongdoing . . . in a civilian complaint" prior to June 12, 2020).

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that the new FOIL regime exempts all pre-existing records from disclosure.[18] Since the repeal of Section 50-a, courts have ordered the production of law enforcement discipline records regardless of the date those records were created, implicitly rejecting the argument that requiring disclosure of such records would be an impermissible retroactive application of the new FOIL. *See, e.g.*, *Schenectady PBA*, 2020 N.Y. Misc. LEXIS 10947, *16-17 (ordering disclosure of records created prior to June 12, 2020).

Second, even if the release of previously exempt records were considered a retroactive application of the repeal of Section 50-a—which it should not be—such retroactive application would be justified because the law serves a remedial purpose. Retroactive effect is given to remedial statutes, which are "designed to correct imperfections in prior law, by generally giving relief to the aggrieved party," *Nelson v. HSBC Bank*, 87 A.D.3d 995, 998 (2d Dep't 2011), and "should be given retroactive effect in order to effectuate [their] beneficial purpose," *Gleason v. Michael Vee, Ltd.*, 96 N.Y.2d 117, 122 (2001). *See also Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 584 (1998) (acknowledging the "settled maxim" that remedial legislation should be applied retroactively). The majority of courts that have applied this analysis to the repeal of Section 50-a agree that the Legislature did not intend to limit the availability of police disciplinary records to those created after June 12, 2020. *See Schenectady PBA*, 2020 N.Y. Misc. LEXIS 10947, *16-17 (stating "there is strong evidence that retroactive effect was intended by the [L]egislature" and ordering disclosure of records created prior to June 12, 2020); *Puig v. City of*

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[18] Other courts have come to similar conclusions regarding changes in their public records laws. *See, e.g.*, *L.A. Police Protective League v. City of L.A.*, 2019 WL 1449721, *3 (Cal. Super. Feb. 19, 2019) (holding "[***t]he question of retroactive application . . . is of no consequence***" because amended law "merely prescribes a law enforcement agency's ***prospective duty***" and statutory language demonstrated that law had "nothing to do with the date on which a personnel records was created") (emphasis added); *State Org. of Police Officers v. Soc'y of Pro. Journalists-Univ. of Haw. Chapter*, 927 P.2d 386, 398-99 (Haw. 1996) (holding retroactivity unimportant because law concerns future obligations).

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Middletown, 2021 N.Y. Misc. LEXIS 1713, *15-16 (N.Y. Sup. Ct. Apr. 7, 2021) (same). As explained in *Puig*, the legislative history leaves no legitimate doubt that the repeal of Section 50-a was "remedial in nature" and meant to permit disclosure of misconduct records created before June 12, 2020, subject only to FOIL's explicit exemptions. 2021 N.Y. Misc. LEXIS 1713, *15-16.

In deciding whether a law is "remedial" and thus should have retroactive effect, courts consider "whether the Legislature has made a specific pronouncement about retroactive effect or conveyed a sense of urgency; whether the statute was designed to rewrite an unintended judicial interpretation; and whether the enactment itself reaffirms a legislative judgment about what the law in question should be." *Gleason*, 96 N.Y.2d at 122. The Legislature was clear that it intended the repeal of Section 50-a to be a remedial law. It (i) pronounced that the repeal of Section 50-a was justified due to the need to access records concerning law enforcement officers' past disciplinary histories (i.e., records created prior to repeal);[19] (ii) conveyed a sense of urgency by enacting the repeal less than a month after nationwide protests over police misconduct began; and (iii) made clear its "legislative judgment" about the reasons that past complaints must be disclosed. *See, e.g.*, N.Y. Senate, Floor Debate, 243rd N.Y. Leg., Reg. Sess. 1821-23 (June 9, 2020) (repeal would give the family of Ramarley Graham, killed by police in 2012, access to records relating to his death); *id.* at 1823 (repeal allows New Yorkers to learn "whether police departments have taken these misconduct complaints seriously ***in the past*** or whether they have ignored or dismissed them.") (emphasis added).

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[19] Senate Bill, S8496, *Justification*, NYSenate.gov, https://www.nysenate.gov/legislation/bills/2019/s8496 (last visited October 1, 2021) (repeal justified in part due to need to access records relating to law enforcement officers with "***histories*** of misconduct complaints [or] recommendations of departmental charges") (emphasis added).

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B. Collective Bargaining Agreements Do Not Shield the Requested Records

NCPD separately argues that certain CBAs predate the repeal of Section 50-a and therefore provide limitations on the availability of records created before June 12, 2020, when the repeal was enacted. But FOIL does not exempt documents that private parties seek to shield from public disclosure pursuant to a contractual agreement with a government agency. Accordingly, courts have rejected the argument that police officer CBAs can serve as an independent basis to shield records from disclosure under FOIL. *UFOA*, 846 F. App'x at 30 ("[T]o the extent that this claim implicates records that must be disclosed under FOIL, ***the NYPD cannot bargain away its disclosure obligations***.") (emphasis added); *Schenectady PBA*, 2020 N.Y. Misc. LEXIS 10947, *15 ("It is axiomatic that the public right of access to records under FOIL cannot be bargained away in collective bargaining between management and labor."). Similarly, this Court should reject NCPD's attempt to "bargain away its disclosure obligations" under FOIL.

III. None of NCPD's Claimed FOIL Exceptions Justify Withholding the Records in Dispute

A. Petitioner Reasonably Described its Requests for Records Related to NCPD's Use of Force and Police Stops

In its June Response, NCPD cited POL Section 89(3)(a) to deny two of Petitioner's FOIL requests on grounds that they were "not reasonably described."[20] Specifically, NCPD stated that Petitioner had not reasonably described its requests for "all reports documenting use of force" and "all records documenting stops and/or field interviews."[21] NCPD provided no rationale nor support for its assertion that Petitioner inadequately described its requests for these records. However, even if FOIL permitted NCPD to deny Petitioner's request based on bare assertions that

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20 Exhibit 14 to the Verified Petition at 5.

21 *Id.*

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Petitioner did not reasonably describe the requested records, which it does not, NCPD's denial would still be improper because Petitioner's requests meet the standard for descriptiveness under FOIL.

For example, Petitioner requested reports documenting "use of force," which it defined as: "the use of weapons, including [a list of common weapons, such as firearms and tasers]"; and (b) "the use of bodily force that includes a degree of physical contact, including [a list of common forms of physical contact, such as kicking and punching]".[22] Petitioner further clarified its request in the February 10 Letter by providing the specific forms that Respondents should produce, such as PDCN Form 32 and PDCN Form 258, based on what was explicitly described as the correct forms by Mr. Todd during the meet-and-confers held on December 29, 2020 and January 7, 2021. Petitioner also requested records documenting "stops" and/or field interviews in the same manner—providing an initial definition in the Requests and then listing the specific forms that Mr. Todd described to Petitioner as the correct forms to request in the February 10 Letter.[23] Nevertheless, despite the clear definitions and detailed descriptions of the records Petitioner sought, NCPD claimed that these requests were still "not reasonably described."[24]

Under FOIL, a record is "reasonably described" when its description allows an agency to locate and identify the records in question. *M. Farbman & Sons, Inc. v. N.Y.C. Health & Hospitals Corp.*, 62 N.Y.2d 75, 82-83 (1984). "Where the request is sufficiently detailed to enable the agency to locate the records in question, the agency cannot complain about the nomenclature of

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22 Exhibit 2 to the Verified Petition.

23 *Id.*; Exhibit 7 to the Verified Petition.

24 Exhibit 14 to the Verified Petition at 5.

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the request as described." *Jewish Press v. New York City Dept. of Educ.*, 183 A.D.3d 731, 732 (2d Dep't 2020).

Petitioner's FOIL requests for use of force reports and stop and field interview records meet the standard required for documents to be "reasonably described." The record demonstrates that Petitioner's requests are specific, containing detailed definitions of "force" and "stop" and even listing granular information about the records sought by form number and title (information obtained directly from NCPD's representatives during discussions about Petitioner's Request). Petitioner's specific descriptions are more than sufficient to allow NCPD to identify and locate responsive records. Accordingly, Petitioner "reasonably described" its requests under FOIL and the Court should reject NCPD's efforts to invoke POL Section 89(3)(a) as a shield against disclosure.

B. The Privacy Exemption Does Not Shield Law Enforcement Discipline Records, and the Availability of Redaction Obviates Any Valid Privacy Concerns

Despite FOIL case law and the amended statutory language—each making clear that redaction is the appropriate means to address the very narrow privacy concerns potentially implicated here—NCPD claims that (i) law enforcement disciplinary records that were determined by NCPD to be exonerated, unfounded, or undermined; (ii) unsubstantiated or not yet substantiated civilian complaints, and (iii) investigative reports of complaints are categorically exempt from disclosure under POL Section 87(2)(b) because disclosure of such records "would be an unwarranted invasion of privacy."[25] This Court, like the majority of courts who have addressed this question, should reject NCPD's overbroad, categorical argument.

[25] *Id.* at 2, 6-7.

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As a threshold matter, the 2020 amendments to FOIL accompanying the repeal of Section 50-a expressly define "law enforcement disciplinary records" subject to disclosure to include the: (i) "***complaints, allegations, and charges*** against an employee." N.Y. Pub. Off. Law § 86(6) (emphases added). Notably, the amendments ***do not*** say that complaints, allegations, and charges must be "substantiated" to be subject to disclosure. Moreover, POL Section 86(7) defines a "law enforcement disciplinary proceeding" whose records are subject to disclosure as "the ***commencement*** of any investigation and any subsequent hearing" (emphasis added). That is, records are subject to FOIL's presumption of access at the ***start*** of an investigation, not after completion, and certainly not only after a complaint is determined to be meritorious. If the Legislature intended the 2020 FOIL amendments to exempt from disclosure all information concerning unsubstantiated complaints, these provisions would be meaningless and nonsensical.

In amending POL Section 87, the Legislature detailed how privacy concerns should be balanced with public access to police records. POL Section 87 now requires certain identifying information to be redacted specifically from law enforcement disciplinary records before production and permits other potentially sensitive information to be redacted at the discretion of the responding agency. *See* N.Y. Pub. Off. Law §§ 87(4-a, 4-b). The Legislature made a reasoned determination regarding what disciplinary records must be made publicly available and what limited information can and must be redacted from such records to protect the privacy, safety, and well-being of individual officers.

An agency may also withhold certain information under the general privacy provision of POL Section 87(2)(b) if that information falls within a non-exhaustive list of categories found in POL Section 89(2)(b), including, for example, "medical or credit histories," "personal information" that is irrelevant to agency work, and certain personal contact information. Where,

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as here, the information requested does not fall into one of these categories, courts determine whether information is "private" and whether disclosure is "unwarranted" by identifying the privacy interests at stake and balancing them against the public interest in disclosure of the information. *New York Times Co. v. N.Y.C. Fire Dep't*, 4 N.Y.3d 477, 485 (2005).

For information to be considered "private," it must be of an "intimate" or "personal" nature. *See Hanig v. New York State Dep't of Motor Vehicles*, 79 N.Y.2d 106, 112 (1992). In considering whether disclosure of any such private information would be "unwarranted," courts must keep in mind that "[p]ublic employees have less entitlement to privacy than do non-public employees, at least where job performance is concerned." *Schenectady PBA*, 2020 N.Y. Misc. LEXIS 10947, at *13. New York courts have recognized that the "proficiency of public employees in the performance of their job duties" is of "compelling interest to the public." *Mulgrew v. Bd. of Educ. of City Sch. Dist. of City of New York*, 87 A.D.3d 506, 508 (1st Dep't 2011); *see also Gray Media Grp. v. City of Watertown*, 2020 N.Y. Misc. LEXIS 11618, at *5 (N.Y. Sup. Ct. Aug 18, 2020) ("privacy interest" in how city manager "conducts his duties . . . should be minimal"). An invasion of privacy is not "unwarranted" if it sheds light upon the operations of government agencies or the proficiency of government employees. *See LaRocca v. Bd. of Educ.*, 220 A.D.2d 424, 429 (2d Dep't 1995).

Since the repeal of Section 50-a, the vast majority of New York courts have held that law enforcement disciplinary records and "unsubstantiated" civilian complaints do not categorically fall within the statutory definitions of materials that can be withheld in their entirety on the basis of personal privacy claims. *See Schenectady PBA*, 2020 N.Y. Misc. LEXIS 10947, at *11, *13, *17 (holding that police officer's disciplinary record, including "unsubstantiated" complaints, must be disclosed in response to a [FOIL] request because withholding such records "would render

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the legislature's repeal of CRL §50-a utterly meaningless"); *Herrera*, 2021 WL 1247418, at *5 (declining to limit production to only "substantiated" records and noting that "privacy concerns should be allayed by" redactions listed in POL §§ 89(2-b) and (2-c)). *Cooper*, 71 Misc. 3d at 567 ("The legislative intent in repealing 50-a was to make law enforcement disciplinary records fully available. The definition of 'law enforcement disciplinary records' is expansive and inclusive. It does not distinguish between unfounded, exonerated, substantiated or unsubstantiated."); *cf. UFOA*, 846 F. App'x at 30 (rejecting police union's privacy argument); *Buffalo Police Benevolent Ass'n. v. Brown*, 134 N.Y.S.3d 150, 154-55 (N.Y. Sup. Ct. 2020) ("*Buffalo*") (holding that "a blanket prohibition on the release of any and all information regarding any complaint deemed 'unsubstantiated'" is a "drastic" and "inappropriate" remedy).

The primary exception in the case law, *New York Civ. Liberties Union v. City of Syracuse et al.*, 148 N.Y.S.3d 866 (N.Y. Sup. Ct. 2021) ("*Syracuse*"), held that the repeal of Section 50-a "does not require documents related to unsubstantiated claims against police officers to be released" and "the public interest in the release of unsubstantiated claims do[es] not outweigh the privacy concerns of individual officers." *Id.* at 873. Petitioner respectfully submits that *Syracuse* was wrongly decided for several reasons.[26] First, the *Syracuse* court misapprehended Petitioner's position as broadly asserting that the new FOIL regime required the production of unsubstantiated complaints without any redactions (*id.* at 872 (framing the question before it as whether "the subject records should be disclosed wholesale" or withheld wholesale)), thereby ignoring all privacy considerations. Petitioner's position, however, is that agencies cannot categorically

[26] On August 10, 2021, the court in *NYCLU v. Rochester* adopted the *Syracuse* court's conclusion in a cursory one-page discussion that did not acknowledge any of the majority of court opinions to have disagreed with *Syracuse*, and therefore suffers from the same deficiencies as the *Syracuse* opinion. *See* Decision and Order, Index. No. E2020009879, NYSCEF Doc. No. 47.

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withhold "unsubstantiated" civilian complaints because privacy concerns can be addressed through legitimate, targeted redactions consistent with FOIL. Second, the *Syracuse* decision is in direct conflict with the Court of Appeals' binding directive that POL Section 87(2)(b) does not permit agencies to "refuse to produce the whole record simply because some of it may be exempt from disclosure" pursuant to the privacy exemption. *Schenectady Cty. Soc'y for Prevention of Cruelty to Animals, Inc. v. Mills*, 18 N.Y.3d 42, 46 (2011). Third, in allowing police to withhold the very records the repeal of Section 50-a was intended to make public, the *Syracuse* decision rejects the clear legislative intent behind the Repeal Bill. *Syracuse*, 148 N.Y.S.3d at 872. For these reasons, Petitioner respectfully submits that the recent decisions in *Schenectady PBA*, *Buffalo*, *Herrera*, and *UFOA* are more persuasive and consistent with the statute and with controlling precedent than *Syracuse*.

The result urged by Petitioner is consistent with the Legislature's purpose in repealing Section 50-a and amending FOIL. FOIL's amendments were intended to heighten accountability for police forces considering the recent spotlight on racism, corruption, and fatal use of force, particularly against Black men, women, and children. *See Schenectady PBA*, 2020 N.Y. Misc. LEXIS 10947, at *2 ("[S]trong lobbying by advocacy groups, coupled with recent nationwide protests in the name of racial equality and demanding massive reform, were the catalysts for the statutory repeal of [Section] 50-a."). NCPD has not demonstrated that disclosure of any records it attempts to withhold would result in an unwarranted invasion of privacy; it has only invoked bare statutory language and claimed, in a cursory and categorical manner, that disclosure would have such a result. The Court should reject NCPD's attempts to invoke the privacy exemption and grant Petitioner's FOIL request with respect to all documents improperly withheld under that exemption.

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Petitioner respectfully submits that the categories of information listed in POL Section 89(2)(b) may be redacted from the records sought, and the records then produced in redacted form.

C. The Exemption for Inter-Agency or Intra-Agency Materials Does Not Shield Law Enforcement Disciplinary Records, Use of Force Records, or Investigative Reports

NCPD invoked POL Section 87(2)(g) in response to Petitioner's requests for law enforcement disciplinary records, use of force records, and investigative reports.[27] This exemption protects "inter-agency or intra-agency materials," and is sometimes referred to as the "deliberative process" exemption because it is meant to shield "communications exchanged for discussion purposes not constituting final policy decisions." *Russo v. Nassau Cnty. Cmty. Coll.*, 81 N.Y.2d 690, 699 (1993). The exemption explicitly does not apply to "factual" data or "final agency policy or determinations." N.Y. Pub. Off. Law § 87(2)(g)(i); *see also Gould*, 89 N.Y.2d at 276 ("intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination"). The Court of Appeals has explained that "factual data" means "objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making." *Id.* at 277.

First, the disciplinary and investigative records Petitioner seeks do not qualify as exempt "deliberative" records, as courts have squarely held since the repeal of Section 50-a. The *Schenectady PBA* court stated plainly that police disciplinary records "do not fall within the exception to disclosure for materials that are inter-agency or intra-agency." 2020 N.Y. Misc. LEXIS 10947, at *14; *see also Walls v. City of New York*, 502 F. Supp. 3d 686, 698 (E.D.N.Y. 2020) (collecting cases declining to apply the "deliberative process privilege" to police

[27] Exhibit 14 to the Verified Petition at 2, 5-7.

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disciplinary records and holding that that privilege "does not preclude the disclosure of documents concerning [disciplinary] investigations.").

These recent decisions are consistent with those of other New York courts that routinely find employee discipline and other investigatory records not exempt from disclosure under FOIL where those records are largely comprised of "factual" information. *See, e.g.*, *Gould*, 89 N.Y.2d at 277 ("witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations"); *Mulgrew*, 87 A.D.3d at 507 (reports containing factual information not subject to exemption); *Ingram v. Axelrod*, 90 A.D.2d 568, 569 (3d Dep't 1982) (holding factual portions of report disclosable and that just because "some of the data might be an estimate or a recommendation does not convert it into an [exempt] expression of opinion").

Second, NCPD has not demonstrated that its use of force records contain deliberative information. If a use of force report expresses some deliberative ideas or opinions, NCPD may redact that deliberative content, but it is well-established that NCPD is not entitled to withhold the report in its entirety. *See Ingram*, 90 A.D.2d at 570 (requiring disclosure of record and only exempting portions under POL Section 87(2)(g) that contained "opinions and recommendations").

NCPD's reliance on *Gannett Co. v. James*, 86 A.D.2d 744 (4th Dep't. 1982) in support of its position that POL Section 87(2)(g) exempts all use of force records from disclosure goes too far.[28] In *Gannett,* the Appellate Division found that the particular "use of force" forms at issue in that case necessarily contained an officer's "candid views," and therefore held that the forms could be withheld under POL Section 87(2)(g) because they contained information other than factual or statistical information. *See id.* at 745. NCPD, however, has provided no evidence to establish that its "use of force" forms are similar to those at issue in *Gannett* to justify withholding such records.

[28] Exhibit 14 to the Verified Petition at 5.

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POL Section 87(2)(g) is not intended to shield factual information contained within documents requested under FOIL. *See, e.g.*, *Prisoners' Legal Servs. of New York v. New York State Dep't of Corr. & Cmty. Supervision*, 173 A.D.3d 8, 12-13 (3d Dep't 2019) (use of force reports were not exempt under personnel records exemption given, among other things, "their factual nature"); *Lindell v. Bd. of Educ. of the Connetquot Cent. Sch. Dist. of Islip*, 2019 N.Y. Misc. LEXIS 3191 (N.Y. Sup. Ct. May 24, 2019) ("compilation of interviews and written statements involved in an investigation of a complaint" were not exempt); *New York Civ. Liberties Union v. Erie Cnty. Sheriff's Office*, 2015 N.Y. Misc. LEXIS 802 (N.Y. Sup. Ct. Mar. 17, 2015) ("complaint summaries" contained "factual" information and therefore were not exempt). Accordingly, NCPD cannot rely on the *Gannett* decision to argue for a blanket prohibition on the disclosure of these records, and NCPD's attempt to withhold use of force forms should be rejected by this Court.

D. The Law Enforcement Exception Does Not Shield Open Disciplinary Records or Investigative Records

NCPD claims that POL Section 87(2)(e), known as the "law enforcement exception," shields open disciplinary records and investigative reports from disclosure.[29] Specifically, NCPD denied Petitioner's requests (i) for "open Department disciplinary action" on grounds that the records are exempt as "records compiled for law enforcement purposes;"[30] and (ii) for "all investigative reports regarding each law enforcement officer cleared of wrongdoing" in a civilian complaint on grounds that records "associated with disciplinary cases that have not reached a disposition are exempt from disclosure" under "POL § 87(2)(e) as records compiled for law

[29] *Id.* at 3, 7.

[30] *Id.* at 3.

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enforcement purposes that if disclosed would interfere with judicial proceedings and deprive a person of a right to an impartial adjudication."[31]

The law enforcement exception is intended to shield only information "compiled for law enforcement purposes," meaning information collected in connection ***with criminal prosecutions and investigations***. *See, e.g.*, *New York Times Co. v. New York State Exec. Chamber*, 57 Misc. 3d 405, 411 (N.Y. Sup. Ct. 2017) ("The exemption is based on the risk that such disclosure would have a chilling effect on a pending prosecution, would create a substantial likelihood of delay in a pending criminal proceeding, or would interfere with criminal discovery rules."); *Madeiros v. New York State Educ. Dept*., 30 N.Y.3d 67, 75-76 (2017) (law enforcement exception applies to records compiled in the aid of "[t]he detection and punishment of violations of the law"). "Law enforcement purposes" does ***not*** mean internal agency investigations concerning an employee's alleged misconduct, even if those internal investigations are of law enforcement officers. *See Jewish Press v. Kingsborough Cmty. Coll.*, 2020 N.Y. Misc. LEXIS 2827, at *19 (N.Y. Sup. Ct. June 22, 2020) ("employee complaints that were subject to the internal investigation" not exempt under POL Section 87(2)(e)).

NCPD has not come close to meeting its burden under the FOIL of demonstrating with particularity and specificity that the requested material falls squarely within the FOIL law enforcement exemption as it has asserted only conclusory, categorical justifications without evidentiary support.[32] *See, e.g.*, *Crown Castle NG E. LLC v. Town of Hempstead*, 2017 N.Y. Misc. LEXIS 4768, at *6, *8 (N.Y. Sup. Ct. Nov. 28, 2017) (emphasizing that "[w]holly blanket-type statements and/or [c]onclusory assertions" are "not sufficient" to justify withholding documents);

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31 *Id.* at 6-7.

32 *See* Argument Section I, *supra*.

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Estate of Rebello v. Dale, 2014 N.Y. Misc. LEXIS 2444, at *13 (N.Y. Sup. Ct. Apr. 1, 2014) ("Apart from the unelaborated assertion that they are 'investigating' . . . respondents have not described precisely what sort of investigation they are currently conducting . . . ."). The Court should reject NCPD's attempts to invoke the law enforcement exception and instead grant Petitioner's FOIL request with respect to all documents improperly withheld under that exception.

IV. NCPD's Constructive Denial of Petitioner's Requests for Statistical Information Related to Complaints and Investigations is Improper

NCPD's failure to produce responses in full to Petitioner's requests for "[r]ecords sufficient to identify the total number of civilian complaints per calendar year, broken down by the subject of the complaint" ("Request 12") and "[r]ecords sufficient to identify the total number of internal investigations concerning alleged misconduct by police officers opened by NCPD per calendar year, broken down by the subject of the investigation" ("Request 17"), constitutes an improper constructive denial.[33]

POL Section 89(3)(a) requires agencies, in response to a FOIL request, to either (1) make the requested records available, (2) deny the requests in writing, or (3) furnish a "written acknowledgement of the receipt of such request and a statement of the approximate date . . . when such request will be granted or denied." POL Section 89(4)(a) states that "[f]ailure by an agency to conform to the provisions of subdivision three of this section shall constitute a denial." Where an agency responds to a request by making available documents different from those requested and is otherwise silent on its failure to make the requested records available, the agency's response is considered a constructive denial.

[33] Exhibit 2 to the Verified Petition at 4-5.

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NCPD responded to Petitioner's Requests #12 and #17 in its December Response only, directing Petitioner to NCPD's "Complaint Reporting and Findings" report.[34] This report contains various statistics regarding the number, type, and disposition of civilian complaints made against members of the NCPD from 2016 to 2020, and a description of NCPD's policies and procedures for investigating complaints.[35] Despite the fact that Petitioner's FOIL Requests, including Requests #12 and #17, sought records dating back to January 1, 2000, NCPD provided only links to statistical information dating back to 2016 at the furthest.[36] This was, at best, only partially responsive to Petitioner's Requests.

Accordingly, NCPD failed to comply with POL Section 89(3)(a). NCPD has not made information prior to 2016 available to Petitioner, and it has not explicitly granted or denied Petitioner's request for such information. This failure to satisfy the requirements of POL Section 89(3)(a) constitutes a constructive denial of Petitioner's FOIL Requests #12 and #17. NCPD has provided no justification for this constructive denial, which is improper.

V. The NYCLU is Entitled to Attorneys' Fees and Costs

If the Court holds that NCPD has refused to produce records in violation of FOIL and in derogation of the repeal of Section 50-a, Petitioner is entitled to reasonable attorneys' fees and litigation costs. Courts are required to assess reasonable attorneys' fees and costs when a party has "substantially prevailed" and the agency had "no reasonable basis for denying access" to the records in dispute. N.Y. Pub. Off. Law § 89(4)(c). An award of fees and costs is warranted where, among other things, an agency "seek[s] to broaden" a well-established FOIL exemption as a means to withhold documents. *See Rauh v. De Blasio*, 75 N.Y.S.3d 15, 20-21 (1st Dep't 2018). POL

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[34] Exhibit 5 to the Verified Petition at 3-4.

[35] *Id.* at 4.

[36] *Id.*

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Section 89(4)(c) requires courts to assess attorneys' fees and costs in these circumstances in part because agency attempts to withhold documents that should be made public under FOIL "run counter to the public's interest in transparency and the ability to participate on important issues of municipal governance." *Id.* at 21. Courts have determined that an award of attorneys' fees and costs is the proper tool to remedy such misconduct. *Id.*

If this Court orders Respondents to disclose documents, Petitioner will have "substantially prevailed" for the purposes of POL Section 89(4)(c). *See Bottom v. Fischer*, 129 A.D.3d 1604, 1605 (4th Dep't 2015) (petitioner substantially prevailed when respondent made disclosures after "court directed it to justify their nondisclosure"). The recipient of a FOIL request seeking to prevent disclosure of the records "carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access." *Capital Newspapers*, 496 N.E.2d at 667. NCPD has not provided Petitioner any particularized justification for why the requested records purportedly fall under the FOIL exceptions NCPD cites, instead parroting only "sections, subdivisions and subparagraphs of the applicable statute and conclusory characterization of the records sought to be withheld." *Church of Scientology v. New York*, 46 N.Y.2d 906, 907-08 (1979). As such, an award of reasonable attorneys' fees and litigation costs is appropriate.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court order Respondents to produce all responsive records, subject to only the narrow redactions permitted by FOIL, and to pay Petitioner's reasonable attorneys' fees and costs.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

Respectfully submitted,

Dated: October 1, 2021
New York, New York

By: /s/ *Kingdar Prussien*

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CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

WORD COUNT CERTIFICATION

I, Kingdar Prussien, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this Memorandum of Law complies with the word count limit set forth 22 NYCRR § 202.8-b, because it contains 6,823 words, excluding the parts exempted by § 202.8-b(b). In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum.

Date: October 1, 2021

/s/ Kingdar Prussien
Kingdar Prussien

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